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CASE NO. 80-1430

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Ted Engle, Superintendent
Chillicothe Correctional Institute
Petitioner

-v-

Lincoln Isaac, et al.
Respondents

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AND FOR APPOINTMENT OF COUNSEL

First, Respondent Lincoln Isaac, who is currently residing at 310 Ray Avenue, Circleville, Ohio, and who was paroled from the Chillicothe Correctional Institute asks leave to file the attached Brief in Opposition to Certiorari to the United States Court of Appeals for the Sixth Circuit without payment of costs and to proceed in forma pauperis pursuant to Rule 46.

The Respondent's affidavit in support of this motion is attached hereto.

Second, Respondent Lincoln Isaac further asks this court to appoint James R. Kingsley as his counsel and to reimburse him pursuant to Rule 46.7.

James R. Kingsley

James R. Kingsley
Attorney for Lincoln Isaac
157 West Main Street
Circleville, Ohio 43113
(614) 477-2546

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-v-

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Respondents

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
ON APPEAL IN FORMA PAUPERIS

STATE OF OHIO)
)SS:
COUNTY OF PICKAWAY)

I, Lincoln Isaac, being first duly sworn, depose and say in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, states that:

1. I am the Respondent in the above-entitled action.

2. Because of my poverty, I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. The United States District Court for the Southern District of Ohio, Eastern Division, and the Sixth Circuit Court of Appeals have previously granted me in forma pauperis status.

5. I believe that I am entitled to the favorable decision granting a writ of habeaus corpus to me in the Sixth Circuit Court of Appeals en banc.

6. I am well satisfied with the representation rendered me by James R. Kingsley, Attorney At Law, in the prior proceedings, and I desire that he continue to represent me, but I am without funds to pay him.

7. I have not paid James R. Kingsley, nor any of his associates, for pursuing my writ of habeaus corpus, nor for any of the ensuing appeals to-date.

8. I further swear that the responses which I have made to the following questions are true:

Q) Are you presently employed?

A) Yes. Self-employed-service septic tanks at my residence of 310 Ray Avenue, Circleville, Ohio. I grossed $4,436 in the year 1980, $400 in January, 1981 and $400 in February, 1981.

Q) Have you received within the past twelve months any income in the form of rent payments, interest, dividends, or other source?

A) Interest on CD in trust 1980-$348.

Q) Do you own any cash or checking or savings account?

A) Cash-$200; Personal Checking-$190; Savings-$50.

Q) Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

A) 1957 Chevrolet Truck (inoperable), 1972 Dodge (mtg.), 1968 International (mtg.), 1970 Ford Pickup (mtg.), 1969 Cadilac (mtg.).

Q) List the persons who are dependent upon you for support and state your relationship to those persons.

A) Just myself.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

x Lincoln Isaac
Lincoln Isaac

Sworn to and subscribed in my presence this 16th day of March, 1981, at Circleville, Ohio.

(SEAL)

James R. Kingsley

JAMES R. KINGSLEY
NOTARY PUBLIC—STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.

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October Term, 1980

Ted Engle, Superintendent
Chillicothe Correctional Institute
Petitioner

-v-

Lincoln Isaac, et al.
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES R. KINGSLEY
Attorney At Law
157 West Main Street
Circleville, Ohio 43113
(614) 477-2546

ATTORNEY FOR RESPONDENT,
LINCOLN ISAAC

Best Copy Available

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QUESTIONS PRESENTED

1. DOES THE WAINWRIGHT V. SYKES CAUSE/PREJUDICE TEST APPLY TO A RETROACTIVE CHANGE IN THE LAW?

2. ONCE THE HIGHEST COURT OF A STATE IN ITS SYLLABUS DECLARES A CHANGE IN LAW TO BE RETROACTIVE, CAN IT USE A PROCEDURAL "COTEMPORANEOUS OBJECTION" RULE TO BAR A NEW TRIAL WHEN DEFENDANT'S TRIAL RECORD DEMONSTRATES THE CHANGE IN THE LAW WOULD MATERIALLY AFFECT ITS OUTCOME?

3. ONCE THE SUPREME COURT OF THE UNITED STATES DECLARES A PRINCIPLE OF LAW TO BE RETROACTIVE, CAN A STATE REFUSE A DEFENDANT A NEW TRIAL BASED ON A STATE PROCEDURAL RULE?

4. WHEN TWO DEFENDANTS ATTEMPT TO PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THE AFFIRMATIVE DEFENSE OF SELF-DEFENSE, ONE AT A JURY TRIAL AND THE OTHER AT A COURT TRIAL, THEN SUBSEQUENTLY THE HIGHEST COURT OF THE STATE DECLARES THE BURDEN TO BE ERRONEOUS, AND THE CHANGE TO BE RETROACTIVELY APPLIED, IS THE GRANTING OF A NEW TRIAL ONLY TO THE DEFENDANT WHO WAS FOUND GUILTY BY THE COURT ALONE AND THE BARRING OF A NEW TRIAL TO THE DEFENDANT WHO WAS FOUND GUILTY BY THE JURY BECAUSE HE FAILED TO OBJECT TO THE JURY INSTRUCTIONS, A DENIAL OF EQUAL PROTECTION OF THE LAW?

5. WHEN TWO DEFENDANTS, AT SEPARATE TRIALS, ATTEMPT TO PROVE AFFIRMATIVE DEFENSES BY A PREPONDERANCE OF THE EVIDENCE, AND BOTH FAIL TO OBJECT TO JURY INSTRUCTIONS, IS THE APPELLATE COURT'S FINDING THE FAILURE TO OBJECT TO BE PLAIN ERROR IN ONE TRIAL, BUT NOT THE OTHER, A DENIAL OF EQUAL PROTECTION OF THE LAW?

6. DOES DUE PROCESS OF LAW FORBID A CONVICTION WHERE A JURY IS INSTRUCTED THE DEFENDANT HAS THE BURDEN TO PROVE SELF-DEFENSE WHEN THE HIGHEST COURT OF THE STATE DECLARES THAT THE DEFENDANT HAD NO SUCH BURDEN?

7. IS IT A DENIAL OF DUE PROCESS OF LAW TO REQUIRE A DEFENDANT TO PROVE SELF-DEFENSE BY A PREPONDERANCE OF THE EVIDENCE?

8. IS THE REFUSAL OF THE HIGHEST COURT OF THE STATE TO FIND "PLAIN ERROR" IN CASES PENDING ON REVIEW WHEN IT CHANGES THE LAW IN A CONSTITUTIONALLY PROTECTED AREA AND THEN DECLARES THE CHANGE TO BE RETROACTIVE A VIOLATION OF DUE PROCESS OF LAW?

STATUTES INVOLVED

Criminal Rule 30, INSTRUCTIONS.

At the close of the evidence, or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the request. Copies of such request shall be furnished to all other parties at the time of making such request. The court shall inform counsel of its proposed action upon the request prior to the arguments to the jury, but the court shall not instruct the jury after the arguments are completed. The court need not reduce instructions to writing.

No party may assign as error any portion of the charge or admission

therefrom unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds to his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Criminal Rule 52(b), PLAIN ERROR.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

Lincoln Isaac went unanounced to pick up his ex-wife, who worked at a bar. He claimed her boyfriend, who drove up at closing time, sucker punched him first and that he acted in self-defense when he got the winning end of the ensuing fight.

There was no evidence except the testimony of the defendant and the victim as to who threw the first punch.

Pursuant to Ohio Revised Code 2901.05, in effect at the time of this trial, the court charged that the defendant had to prove, by a preponderance of the evidence, he acted in self-defense. The defendant did not object to the jury instructions given.

The defendant was found guilty of a lesser included offense of Aggravated Assault and was sentenced to the Ohio Penitentiary for a period of six months to five years.

The defendant appealed. While in the Fourth District Court of Appeals, the State of Ohio decided the case of State v. Robinson, 47 Ohio St. 2d 103 (1976), 351 NE 2d 88. It was declared that the State not only bore the burden of proof beyond a reasonable doubt of all statutory elements of the crime, but also had to prove the nonexistence of an affirmative defense, once raised by sufficient evidence.

Defendant argued that Robinson required the granting to him a new trial. The Court of Appeals found Criminal Rule 30 barred him relief because he had not objected to the jury instructions.

On appeal to the Supreme Court of Ohio, the defendant argued, among other things, Criminal Rule 30 could not bar review of his case; failure to object was plain error, and Robinson should be applied retro-

actively.

The Supreme Court, in State v. Humphries, 51 Ohio St. 2d 95 (1977), 364 NE 2d 1354, simultaneously declared Robinson was to be applied retroactively, but denied defendant's leave to appeal.

The defendant filed a habeas corpus in the U.S. District Court, which found that he was barred by Criminal Rule 30. The U.S. Court of Appeals for the Sixth Circuit found the application of Criminal Rule 30 to be arbitrary and capricious and granted the writ of habeas corpus. The en banc panel affirmed.

REASONS FOR DENYING THE WRIT

I. Response to Petitioner's Concerns

Petitioner's statements as to the number of persons affected by the decision is speculation. If it is true, only twenty-five "live" cases are in existence, then only twenty-five cases will have to be retried. Respondent believes frotnote 8 of Hankerson v. North Carolina, 432 U.S. 233 (1977), states Rule 30 can bar retrials for cases that were not still on appeal at the time of the Robinson decision. Respondent does not believe that the decision specifically ignores footnote 8 as petitioner states.

The decision in the case at bar is not in conflict with the case of Cole v. Stevenson, 620 F 2d 1055 (4th Cir. 1980). In that decision the failure to object was not a result of the highest court of a State declaring a principle of law to be retroactive. The defendant had failed to raise the issue on appeal. Here Isaac did raise it.

The decision does not rewrite the law of Ohio as alleged by petitioner. State v. Abner, 55 Ohio St. 2d 251 (1978), 379 NE 2d 228, did modify Robinson, in that it held that the State need not disprove an affirmative defense once raised. However, it did not state that under the statutes in existence at that time the defendant had to prove self-defense. See State v. Chase, 55 Ohio St. 2d 237 (1978), 378 NE 2d 1064. The rather nebulas holding of the Court appeared to be that there is no burden, hence merely going to reasonable doubt. Even under the law as changed

in State v. Abner, Lincoln Isaac would be entitled to a new trial because he had to prove something that the State declared he had no burden to prove. What the decision in the case at bar does is to require the State of Ohio to try the defendant under the law that the State chose to rewrite.

Petitioner's contention that this decision nullifies the holding of Wainwright v. Sykes is unfounded. Petitioner interprets the en banc decision that any subsequent decision that was not anticipated is cause. Such a statement begs the point. A subsequent decision need not be made retroactive.

Finally, petitioner alleges that this is strictly a state law concern, and there was unnecessary federal interference with a concern of the State. Petitioner appears to be arguing that burden of proof in a criminal trial is not a federally protected concern, and the State may define who has the burden of proving what at its whim. Patterson v. New York, 432 U.S. 197 (1977), does not go so far to allow this to happen.

II. Grounds Supporting Isaac's Retrial

A. Due Process/Retroactivity.

1. DOES THE WAINWRIGHT V. SYKES CAUSE/PREJUDICE TEST APPLY TO A RETROACTIVE CHANGE IN THE LAW?

2. ONCE THE HIGHEST COURT OF A STATE IN ITS SYLLABUS DECLARES A CHANGE IN LAW TO BE RETROACTIVE, CAN IT USE A PROCEDURAL "COTEMPORANEOUS OBJECTION" RULE TO BAR A NEW TRIAL WHEN DEFENDANT'S TRIAL RECORD DEMONSTRATES THE CHANGE IN THE LAW WOULD MATERIALLY AFFECT ITS OUTCOME?

3. ONCE THE SUPREME COURT OF THE UNITED STATES DECLARES A PRINCIPLE LAW TO BE RETROACTIVE, CAN A STATE REFUSE A DEFENDANT A NEW TRIAL BASED ON A STATE PROCEDURAL RULE?

Respondent has always viewed one of the major issues in his case as what is the legal consequence of a court using the term of art "retroactive."

Appellee believes that due process of law requires a jury be properly charged as to the burden of proof existing at the time of his trial. What that law is depends on the decisions of the highest court of state or of the Supreme Court of United States.

Once the Supreme Court of Ohio decided that the Ohio law that applied to the burden of proof of an affirmative defense was wrong, it then could make a constitutional choice: (1) declare the change prospective only, (2) declare the change limited retroactive for those cases on appeal, or (3) make the decision fully retroactive in the case at bar to January 1, 1974.

The Supreme Court of Ohio consciously, in its syllabus, declared the change fully retroactive.

By doing so, the court, by implication, also found the impact on justice not to be so onerous, and also found it was fundamentally unfair to let convictions stand under law that did not exist. P.E. Electric Co. v. Bowers, 164 Ohio St. 209 (1955), 129 NE 2d 467. Otherwise, the Court would have declared the decision prospective only.

Ohio Criminal Rule 30 is not part of, nor can it be interposed as a bar to, a new trial under a change in a constitutionally protected area declared to be retroactive. Defendant can show, by his trial record, that the change was raised (self-defense was an issue), and the change materially affected the outcome of his case. He is entitled to a new trial.

In denying Respondent a new trial, Ohio did not follow its own law. Ohio does not define as retrospective applying a change in the law to a case pending on appeal. State v. Lynn, 5 Ohio St. 2d 106 (1966), 214 NE 2d 226.

Ohio has allowed retroactive application and a new trial when counsel did not object State v. Cowans, 10 Ohio St. 2d 92 (1967), 227 NE 2d 55. Ohio's position of denying retroactive application in other cases has been critized. See the dissent in State v. O'Conner, 6 Ohio St. 2d (1966) at page 183, 217 NE 2d 285 at page 689.

The State of Ohio desires this Court to accept this case for review in hopes that it will declare the Wainwright v. Sykes cause/prejudice test as a bar to the Federal Court's reviewing how the Supreme Court of Ohio has treated the constitutionally protected area of burden of proof.

This en banc panel declared: (1) the burden of proof is, in a criminal case, a part of federal due process of law, (2) a retroactive change in the law cannot be foreseen, (3) once a retroactive change is made in a constitional area, the rationale of Wainwright v. Sykes to bar review of the application that change is inapplicable, and (4) a rule requiring one to object to laws that did not exist at the time is arbitrary and capricious.

To agree with petitioner is to state when Ohio declares a change in law to be retroactive, be it in a constitutionally protected area or otherwise, federal review will never lie because one will never object to the law that was proper at the time of the trial.

B. Equal Protection.

> 4. WHEN TWO DEFENDANTS ATTEMPT TO PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THE AFFIRMATIVE DEFENSE OF SELF-DEFENSE, ONE AT A JURY TRIAL AND THE OTHER AT A COURT TRIAL, THEN SUBSEQUENTLY THE HIGHEST COURT OF THE STATE DECLARES THE BURDEN TO BE ERRONEOUS, AND THE CHANGE TO BE RETROACTIVELY APPLIED, IS THE GRANTING OF A NEW TRIAL ONLY TO THE DEFENDANT WHO WAS FOUND GUILTY BY THE COURT ALONE AND THE BARRING OF A NEW TRIAL TO THE DEFENDANT WHO WAS FOUND GUILTY BY THE JURY BECAUSE HE FAILED TO OBJECT TO THE JURY INSTRUCTIONS, A DENIAL OF EQUAL PROTECTION OF THE LAW?
>
> 5. WHEN TWO DEFENDANTS, AT SEPARATE TRIALS, ATTEMPT TO PROVE AFFIRMATIVE DEFENSES BY A PREPONDERANCE OF THE EVIDENCE, AND BOTH FAIL TO OBJECT TO JURY INSTRUCTIONS, IS THE APPELLATE COURT'S FINDING THE FAILURE TO OBJECT TO BE PLAIN ERROR IN ONE TRIAL, BUT NOT THE OTHER, A DENIAL OF EQUAL PROTECTION OF THE LAW?

Respondent is also entitled to a new trial because he was denied equal protection of the law. State v. Humphries declared Robinson retro-active. In the same decision State v. Myers was decided. Humphries had a jury decide his guilt or innocence; Myers had the Judge do so. The Supreme Court of Ohio held Criminal Rule 30 did not apply to court trials.

The absurdity of this reasoning shows the arbitrary and capricious nature of Criminal Rule 30. Obviously the trial Judge in Myers believed Myers had to prove self-defense by a preponderance of the evidence. Myers was convicted under the wrong law. He got a new trial. The jury

in Humphries also convicted him under the wrong law. He did not get a retrial.

Why should the exercise of one's constitional right to a jury trial make such a crucial difference? In both cases the decision maker was misinformed as to the law.

Isaac, Humphries, and Myers were all entitled to the decision makers being properly informed. Only Myers got a new trial. It appears that if Criminal Rule 30 is upheld under the circumstances, then Isaac and Humphries have been punished for exercising their constitutional right to a trial by jury. Such a distinction is arbitrary and capricious and cannot stand.

The same Fourth District Court of Appeals, who denied Isaac a new trial under Criminal Rule 30, held in State v. Sterling Burke, (Unreported), that his failure to object to the jury instructions that he had the burden to prove he was entitled to carry a firearm was plain error.

An affirmative defense is an affirmative defense, be it self-defense or lawfully carrying of a firearm. A failure to object is a failure to object. The jury was instructed that Isaac had to prove self-defense or that Burke had to prove he was entitled to carry the firearm. In both cases affirmative defenses were raised, and in both cases no objection to the jury instructions were made.

Burke's failure to object was plain error. Isaac's was not.

There is no reasonable justification for the difference in treatment of the defendants and therefore, Isaac has been denied equal protection of the law.

C. Requiring Proof of Self-Defense by Defendant Violates Due Process of Law.

> 6. DOES DUE PROCESS OF LAW FORBID A CONVICTION WHERE A JURY IS INSTRUCTED THE DEFENDANT HAS THE BURDEN TO PROVE SELF-DEFENSE WHEN THE HIGHEST COURT OF THE STATE DECLARES THAT THE DEFENDANT HAD NOT SUCH BURDEN?
>
> 7. IS IT A DENIAL OF DUE PROCESS OF LAW TO REQUIRE A DEFENDANT TO PROVE SELF-DEFENSE BY A PREPONDERANCE OF THE EVIDENCE?

Isaac's jury was told he had to prove self-defense by a preponderance of the evidence. Robinson found such a charge to be prejudicial error, and the State must disprove an affirmative defense once raised. Finally, the State modified Robinson and held that neither person had a burden. Even in light of the modification, Isaac was given a burden of proof where none existed.

The Respondents combined, for purposes of this petition with Isaac, raised below the issue as to whether or not a defendant can ever be required to prove an affirmative defense. Isaac did not specifically raise this issue. However, several members of the en banc panel raised and discussed this issue.

If this case is taken for review, Respondent Isaac is willing to brief and argue this point, but finds it difficult to explain how a decision could be rendered on such a point when it would be raised for the first time to the Supreme Court of the United States.

D. Due Process/Plain Error.

8. IS THE REFUSAL OF THE HIGHEST COURT OF THE STATE TO FIND "PLAIN ERROR" IN CASES PENDING ON REVIEW WHEN IT CHANGES THE LAW IN A CONSTITUTIONALLY PROTECTED AREA AND THEN DECLARES THE CHANGE TO BE RETROACTIVE A VIOLATION OF DUE PROCESS OF LAW?

I cannot think of anymore crucial part of a trial than the charge to the jury. Common sense dictates to state that you cannot have a fair trial without the jury being properly instructed as to the law.

When the Supreme Court of Ohio found that the change in the instruction as to burden of proof constituted prejudicial error, it tacitly admitted that Isaac did not have had a fair trial.

Once the State of Ohio admitted the improper instructions to the jury were prejudicial error, then Criminal Rule 52 provided as an escape valve. The Supreme Court of Ohio refused to allow it. In fact, careful research has revealed that the State of Ohio has never reversed a case upon the doctrine of plain error--whether or not the error was of constitutional dimensions. It is evident that Criminal Rule 52 is a sham or a ruse. Due process of law requires a Court, in some instances,

to recognize that an error is so prejudicial that retrial is necessary.

If a defendant's counsel failed to object at a trial to a law in existence, a defendant can receive a new trial based upon grounds of incompetency. If defendant's counsel does not object because the law was not yet in existence, but was later held to be retroactive then he cannot be held to be incompetent. In the first case, the defendant gets a new trial even though his counsel did not object and he should have. In the second case, the defendant does not get a new trial even though his counsel should not have objected. This does not make any sense, and it is arbitrary and capricious. In both cases the defendants were convicted under improper law.

CONCLUSION

This case should not be accepted for Certiorari, for if it is accepted for review, lower Courts may misread the decision as broadly as they have the past decision of Mullaney. Patterson has set this area of law to rest. Isaac is entitled to a new trial for any one of a number of complex, interrelated reasons. He now has his new trial. If the case is accepted for review, then all issues raised heretofore must be allowed to be argued and decided. All Courts previously have been careful not to reach the issues of complex constitutional dimensions.

Isaac believes that Wainwright v. Sykes has no application to bar federal review of whether or not a State has denied defendant his constitutional rights in the manner in which the State applies a retroactive change in the law.

Isaac believes once a principle is declared retroactive by either a federal or state court, then all defendants who raised that issue at trial below, and on the record, and can show the outcome of their case would be materially affected, are entitled to a new trial.

Isaac believes due process of law requires a jury be charged properly as to the law at the time of the trial. A retroactive decision makes the law different. A defendant is entitled to a new trial under the law as changed.

Isaac believes that defendants must be treated the same. If one fails to object to a jury instruction and gets a new trial, then so should all the defendant who failed to object to jury instructions be entitled to new trials.

Isaac believes that if error occurs in a trial that goes to the heart of the fact finding system, then he should be entitled to a new trial in which the mistake has been removed, regardless of any procedural bars.

The only thing that Isaac and petitioner agree on is that this case is complex. It reaches issues crucial to the fact finding process in a criminal case.

In summary, the danger of lower Court's reading unwarranted meaning into the case is great, unless all the following subtle issues are reviewed and disposed of:

As to the retroactivity question: When must a change in the law be declared retrospective? Are the principles of retroactivity the same for the Federal Courts and the State Court? If not, the Supreme Court of the United States declares a principle of law to be retroactive and then the State refuse or limit its application? Is the decision of a State to declare a principle of state law retroactive subject to federal review? Under what reasoning, if any, can a State deny the benefit of retroactivity to a defendant who, clearly, is affected by the change?

As to the question of equal protection: Is there a distinction between a jury and a Judge as the trier of facts that requires a misinformed Judge to rehear the case, but not the misinformed jury? Is the affirmative defense of self-defense so different from the affirmative defense of lawfully carrying a firearm that plain error lies in failure to object to proving the first, but not the second?

As to due process: Can a defendant even be required to prove self-defense as an affirmative defense? Can a State sustain a conviction

when it required a defendant to prove something, when, in fact, he had to prove nothing?

Finally, is the instruction to the jury so crucial to the fact finding process of a fair trial that any error in it that materially affected the outcome must be reviewed in spite of procedural bars?

Respectfully submitted,

_____

James R. Kingsley

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b), Rules of the Supreme Court, I hereby certify that Respondent Isaac's Motion to Proceed in Forma Pauperis, Affidavit in Support, and Brief in Opposition to Certiorari, was served upon William J. Brown, Attorney General (Simon B. Karas, Counsel of Record) State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio, 43215; Mr. Richard L. Aynes, Counsel for Bell, University of Akron, School of Law, Appellate Review Office, Akron, Ohio, 44325; Mr. J. Dean Carro, Counsel for Hughes, University of Akron, School of Law, Appellate Review Office, Akron, Ohio, 44325, by regular U.S. mail from Circleville, Ohio, this _____ day of March, 1981.

James R. Kingsley

IN THE COURT OF APPEALS OF OHIO

FOURTH APPELLATE DISTRICT

PICKAWAY COUNTY

FEB 1 1973

State of Ohio	:	No. 354
Plaintiff-Appellee	:	
vs	:	
Sterling M. Burke	:	O P I N I O N
Defendant-Appellant	:	

FILED-CT. OF APPEALS
JAN 30 1 42 PM '73
SARA M. DRESHBACH
CLERK OF COURTS
PICKAWAY COUNTY

APPEARANCES

Jay H. Sanford, Columbus, Ohio, for Appellant.

Richard Gerhardt, Circleville, Ohio, for Appellee.

Stephenson, J.,

This is an appeal by Sterling M. Burke from a judgment of conviction and sentence imposed by the Pickaway County Common Pleas Court upon a jury verdict for the offense of carrying a concealed weapon, to-wit: a loaded .38 caliber Smith and Wesson firearm, in violation of R.C. 2923.12. The following errors are assigned:

"ASSIGNMENT OF ERROR NUMBER ONE

In a criminal case involving an affirmative defense under Section 2923.12(C) R.C., the defendant has only the burden of going forward with the evidence pertaining to such a defense and does not have the burden of establishing such affirmative defense by a preponderance of the evidence and, therefore, an instruction to the jury that the defendant must establish the affirmative defense by a preponderance of the evidence is error.

ASSIGNMENT OF ERROR NUMBER TWO

Where the accused in a criminal case is charged with carrying a concealed firearm, a third degree felony pursuant to Section 2923.12 R.C., the state must prove beyond a reasonable doubt that the alleged firearm is capable of inflicting death and capable of expelling or propelling

> one or more projectiles by the action of an explosive or combustible propellant in order for the evidence to support a finding of guilty."

The facts in this case are relatively simple and, in summary, are the following. Appellant was observed in Circleville, Ohio, on June 30, 1975 by the municipal chief of police. When observed, a bulge was observed under appellant's coat which the police chief believed to be a gun. Upon further observation by the chief, appellant's carrying of a weapon was confirmed when the coat gapped open. Appellant was arrested and subsequently indicted. At trial, appellant defended upon the basis of the affirmative defenses set forth in R.C. 2923.12(C)(1) & (2).[1] His evidence in support of those defenses was essentially that he was a field representative for Local 423 of the Laborers International Union of North America and his duties included collecting initiation fees and dues at various job sites. On the date of arrest appellant testified he had collected and had on his person approximately three to five hundred dollars. He further testified he carried the weapon for his protection because of the large sums of Union money he normally had on his person. The evidence further disclosed appellant had been appointed a deputy sheriff of Ashtabula Count and had posted bond for carrying a concealed weapon. He was not, however, on duty at the time and place of the offense.

The trial court instructed the jury, without objection, that the burden was upon appellant to prove his affirmative defense or defenses by a preponderance of the evidence. The court further instructed that "if the weight of the evidence is equally balanced or if you are unable to determine which side of the issue has the preponderance, then the defendant has not established such issues."

The placing of the burden of the affirmative defense upon

appellant was error under State v Robinson, 47 Ohio St. 2d 103, which was announced subsequent to appellant's trial, although such was the long established common law rule and followed in Ohio. The Supreme Court therein held the General Assembly intended in enacting R.C. 2901.05(A), effective January 1, 1974, that by the sentence "The burden of going forward with the evidence of an affirmative defense is upon the accused", the General Assembly intended to negate the common law rule and require that defendant have only the duty to go forward with sufficient evidence to raise the defense.

In Robinson, however, and unlike here, a timely objection was interposed to the instruction in such respect. Crim.R.30 provides in part:

> "A party may not assign as error the giving or failure to give any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury. Amended July 1, 1975."

The Ohio courts generally apply a waiver rule by refusing to consider any error which counsel for a party complaining of a trial court's judgment could have called, but did not, to the trial court's attention at a time when the error could have been avoided or corrected by the trial court. State v Maupin, 42 Ohio St. 2d 473; State v Gordon 28 Ohio St. 2d 45; State v Lancaster, 25 Ohio St. 83; State v Glaros, 170 Ohio St. 471. In State v Humphries, 51 Ohio St. 2d 95, decided July 20, 1977, the court reaffirmed it's adherence to the waiver rule. In Humphries, although the trial had been held prior to the announcement of the Robinson decision, the Court of Appeals applied Crim. R. 30 and the Supreme Court affirmed upon that basis.[2]

Crim. R.52(B), however, does authorize a court to notice

plain error which affects substantial rights in the court's jury instructions even though it was not brought to the attention of the court pursuant to Crim. R.30. 8A Moore's Federal Practice 30-15, Sec. 30.04. Crim. R. 52(B) is a verbatim adoption from the Federal Rules of Criminal Procedure. Crim. R. 52(B) in providing that "plai error" or "defects affecting substantial rights may be noticed", obviously does not define the meaning of such terms.

It has been stated with respect to the federal rule that "in reviewing a trial for plain error, the touchstone is fundamental fairness." U.S. v Garcia, 528 F. 2d 580 (1976). The Ohio State Supreme Court has stated in State v Wolery, 46 Ohio St. 2d 316 (1976 with respect to Crim. R. 52(B) that "The rule's purpose is to safeguard the right of a defendant to a fair trial, notwithstanding his failure to object in timely fashion to error at that trial. However "the plain error rule was intended to be and should be applied to serve rather than subvert the ends of justice. The rule is to be invoked only in exceptional circumstances to avoid a miscarriage of justice." Eaton v United States (C.A. 5, 1968), 398 F. 2d 485, 486.

Additionally, the Ohio Supreme Court has stated, with respect to the Civ. R. 51(A) which requires objections to jury instructions and the concept of fundamental error, that "Exceptions are granted only in circumstances where the error has seriously affected the basic fairness, integrity, or public reputation of the judicial process." Whatever the precise perimeters of the standard may be in application, it is self evident that the instruction must be considered in the light of the evidence, the elements to be prove of the offense charged and the defenses tendered.

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Under the evidence in this case, there existed no factual dispute that appellant carried a weapon concealed upon his person. Nor, for that matter, was it disputed factually that appellant, in the course of his duties, carried large sums of money which he collected from union members at job sites. Thus, whether appellant carried the weapon because, as he claimed, of the large sums of money he collected, the jury clearly was presented with a close question of whether the statutory affirmative defense required acquittal. While it was the jury's perrogative to believe or disbelieve appellant, facially in the record there was no apparent reason for disbelieving him.[3]

Under such circumstances, the erroneous placing of the burden of proof as to the defense upon appellant may well have caused the jury to decide the case upon the further instruction, "if the weight of the evidence is equally balanced or if you are unable to determine which side of the issue has the preponderance, then the defendant has not established such issues." In short, we are in doubt if the same verdict would have been returned had the burden of proof of the defense been properly placed.

Since Crim. R. 52(B) involves the exercise of discretion and necessitates a case by case analysis of the impact of any error, and we have in a number of past appeals held it inapplicable, we are persuaded the erroneous instructions here constituted plain error within the meaning of Crim. R. 52(B), even though Crim. R. 30 was not complied with. The first assignment of error is sustained.[4]

The second assignment of error is overruled. Appellant asserts that even though the firearm was introduced into evidence, together with evidence it was loaded at the time of the offense, and

the jury instructed it must find the weapon was operable or could be readily rendered operable, the evidence was insufficient without additional affirmative evidence as to it's operability. We disagree. Absent any claim or proof at trial of inoperability, the evidence was sufficient for the jury to find against appellant as to such necessary element. The weapon was an exhibit and was subject to examination by the jury. See State v Adkins, 40 Ohio App. 2d 473.

For the reasons above state, the judgment below is reversed and vacated and the case remanded for a new trial.

JUDGMENT REVERSED

Abele, P.J. and Grey, J., CONCUR:

1

(C) It is an affirmative defense to a charge under this section of carrying or having control of a weapon other than dangerous ordnance, that the actor was not otherwise prohibited by law from having the weapon, and that any of the following apply;
(1) The weapon was carried or kept ready at hand by the actor for defensive purposes, while he was engaged in or was going to or from his lawful business or occupation, which business or occupatio was of such character or was necessarily carried on in such manner or at such a time or place as to render the actor particularly susceptible to criminal attack, such as would justify a prudent man in going armed.
(2) The weapon was carried or kept ready at hand by the actor for defensive purposes, while he was engaged in a lawful activity, and had reasonable cause to fear a criminal attack upon himself or a member of his family, or upon his home, such as would justify a prudent man in going armed.

2

The opinion of the Supreme Court in Humphries states in part: "In the Humphries case, the Court of Appeals held, as an additional reason for affirming the judgment of the trial court, that the defense, in failing to object to error in the jury instructions as required under Crim. R. 30, waived any objection to such error on appeal. The defense raised no objection to the application of

(Footnotes cont.)

[2] Crim. R. 30 in its submitted brief to this court, and we find no misapplication of the rule or abuse of discretion on the part of the Court of Appeals in applying the rule to this cause." Inasmuch as Crim. R. 30 places a mandatory duty of objecting to jury instructions as a predicate to assert error on appeal, conceiveably the statement "we find no. . . . abuse of discretion in applying the rule to this cause", reflects a sub silento determination that the discretionary Crim. R. 52(B) "plain error" provision was inapplicable under the factual pattern of the case.

[3] Indicative of the importance of the improper placing of the burden of proof as to the affirmative defense is the disclosure in the record that after deliberations commenced, the jury requested to be re-instructed as to the affirmative defenses and they, for the second time, were informed the burden was upon the defendant.

[4] In fairness to the trial court, it should be noted that this case was tried prior to the Robinson decision. Since announcement of the Robinson decision, error in placing the burden of proof upon the defendant as to affirmative defenses has been frequently assigned. In reviewing these appeals we have found no trial court which instructed the jury otherwise than did the trial court herein prior to the Robinson decision.